Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1998

CERAMICA NUOVA D'AGOSTINO, S.p.A.,

Petitioner,

v.

MCC-MARBLE CERAMIC CENTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case of first impression to this Court which would affect all contracts for the sale of goods in international commerce between parties in signatory nations, was the Circuit Court in error in holding that the parol evidence rule is not applicable to contracts governed by the Convention on Contracts for the International Sale of Goods ("CISG"), a treaty to which the United States is a signatory, so that parol evidence which directly contradicts the express terms of the written agreement between the parties, could be considered on the issue of the parties' intent?

2. Was the Court below in error in holding applicable Article 8 of the CISG which permits, for the purpose of contract interpretation, evidence of subjective intention, where, as here, under common law decisions, it is for the court to interpret the contract because the clear terms of the writing leaves no room for interpretation other than by the court?

3. Was the Court below in error in holding essentially that Fed. R. Civ. P. 56 must give way to Article 8 of the CISG, by permitting conclusory affidavits, utterly devoid of facts, to suffice to defeat summary judgment?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to the proceedings below were the petitioner Ceramica Nuova D'Agostino, S.p.A., and the respondent MCC-Marble Ceramic Center, Inc. The same parties are before this Court.

The petitioner has no parent company or subsidiaries.

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CERAMICA NUOVA D'AGOSTINO, S.p.A.,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner Ceramica Nuova D'Agostino, S.p.A. (hereinafter described as "D'Agostino") respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on June 29, 1998.

OPINIONS BELOW

The Order of the Court of Appeals for the Eleventh Circuit denying a timely petition for rehearing is reprinted in the appendix hereto, p. 1a, *infra*. The opinion of the Court of Appeals for the Eleventh Circuit is reported at 144 F.3d 1384, and is reprinted in the appendix hereto, p. 2a, *infra*.

The orders of the United States District Court for the Southern District of Florida (Kehoe, D.J.) granting summary

judgment to D'Agostino (p.27a, *infra*) are unreported, as is the report and recommendation to that court by the Magistrate Judge appointed to hear and report (p. 32a, *infra*).

JURISDICTION

The diversity jurisdiction of the District Court was invoked under 28 U.S.C. §1331. The action arose under the United Nations Convention on Contracts for the International Sale of Goods. The United States and Italy are signatories to the treaty. 15 U.S.C. Appendix, pp. 332 *et seq.* (1998). The Court further had jurisdiction over the action pursuant to 28 U.S.C. §1332, since the amount in controversy exceeded $50,000, exclusive of interest and costs, and is between a citizen of Florida and a citizen of Italy.

On Respondent's appeal, the Eleventh Circuit, on June 29, 1998, reversed the order of the District Court which had granted summary judgment in D'Agostino's favor and remanded the case to the District Court for further proceedings consistent with its opinion. A timely petition for rehearing was denied on November 6, 1998. The Court issued a mandate to the District Court with respect to the June 29, 1998 Order on November 16, 1998 (p. 25a, infra).

The jurisdiction of this Court to review the order and opinion of the Court of Appeals is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The United Nations Convention on Contracts for the International Sales of Goods (hereinafter, "the CISG") appears at 15 U.S.C. Appendix, pp. 332 et seq. (1998). Portions

of the treaty which are pertinent to the issues discussed herein are reprinted at p. 42a, *infra*.

STATEMENT OF THE CASE

Respondent MCC-Marble Ceramic Center, Inc. ("MCC") is a Florida corporation and a retail tile vendor. D'Agostino is a ceramic tile manufacturer incorporated and resident in Salerno, Italy.

According to the pleadings and other documents submitted by MCC in the District Court, MCC's president, Juan Carlos Monzon, met representatives of D'Agostino at a trade fair in Bologna, Italy in October 1990. They negotiated an agreement to purchase ceramic tiles from D'Agostino. Monzon, who purportedly spoke no Italian, communicated with Gianni Silingardi, then D'Agostino's commercial director, through a translator, Gianfranco Copelli. According to MCC, the parties arrived at an oral agreement as to price, quality, quantity, delivery and payment. The parties then recorded these terms on one of D'Agostino's standard, pre-printed order forms, and Monzon signed the contract on MCC's behalf. According to MCC, the parties also entered into a requirements contract in February 1991, subject to which D'Agostino agreed to supply MCC with ceramic tile at specified discounts as long as MCC purchased sufficient quantities of tile. MCC completed a number of additional order forms requesting tile deliveries pursuant to that agreement.

MCC brought suit against D'Agostino claiming a breach of the February 1991 requirements contract when D'Agostino purportedly failed to deliver orders in April, May and August of 1991. D'Agostino's defense, among others, was that MCC's default in payment of prior shipments relieved it of any further obligation to fill MCC's orders. In support of its position, D'Agostino relied on the printed terms of the contracts

that MCC had executed. According to an English translation of the proposal forms (see p. 58a *infra*), the accuracy of which was undisputed, the front of each order proposal contained the following clause directly above MCC's president Monzon's signature:

> "The buyer states that he is aware of the sales conditions stated on the reverse and that he expressly approves them with special reference to those numbered 1 - 2 - 3 - 4 - 5 - 6- 7 - 8."

Sales condition No. 4 provided that complaints concerning quality of goods must be made by certified letter not later than ten days after receipt of the merchandise. Sales condition No. 6(b) provided that default in payment of prior orders entitled D'Agostino to cancel subsequent orders.

D'Agostino also brought a counterclaim against MCC, seeking damages for nonpayment for deliveries of tile D'Agostino had made between February 28, 1991 and July 4, 1991. MCC asserted that the tile it received was of a lower quality than contracted for, and that, pursuant to the CISG, MCC was entitled to reduce payment. It was undisputed that MCC at no time sent any written communications, required by sales condition and by certified mail or otherwise, to D'Agostino complaining of any defects in the goods.

MCC did not dispute these underlying facts before the district court, but asserted that the parties subjectively intended that the terms printed on the back of the order forms were not to be binding. MCC submitted an affidavit from Monzon which stated in pertinent part:

"3. That I was introduced to Gianni Silingardi, who was the commercial director of d'Agostino, by Gianfranco Copelli, one of their commissioned agents, at a trade fair in Bologna, Italy in October of 1990.

"4. That Sr. Copelli acted as an interpreter between me and Sr. Silingardi at the Bologna trade fair in October, 1990, since I then spoke only Spanish and English, while Sr. Silingardi spoke only Italian.

"5. That an oral agreement was reached at that time between d'Agostino and Super Tiles for the purchase and sale of one shipment of ceramic tile....

"8. That the price and quantity terms were recorded on a d'Agostino order form, which form was not intended to modify or supersede the parties' oral agreement.

"9. That I did not inquire into the terms written on the reverse side of that order form, which, in any event, I would

> have been unable to read, since the sole purpose of the written form was to record the oral agreement.
>
> "10. That I had no intention to assent to the terms written on the reverse of the form, nor was there a translation of them by Sr. Copelli, nor any discussion of them with Sr. Silingardi."

MCC also submitted an affidavit from Gianfranco Copelli, an alleged former agent of D'Agostino. Copelli's affidavit tracked the language of the Monzon affidavit stating that the parties arrived at an oral agreement for D'Agostino to supply quantities of ceramic tile to MCC. He claimed that the parties memorialized the terms of the oral agreement on a standard D'Agostino order form, but that he did not translate the terms of the order form. He asserted in conclusory fashion:

> "12. That there was no intention on the part of either d'Agostino or Super Tiles [MCC] for the terms printed on the reverse side of the d'Agostino order form to be incorporated in the requirements contract which governed their relationship for the remainder of 1991."

MCC submitted the affidavit of Gianni Silingardi, who stated he was Commercial Director of D'Agostino for approximately two years from late 1989 to early 1991, when he was fired by D'Agostino. Silingardi's affidavit was a mirror image of that of Monzon and Copelli. Silingardi conclusorily claimed in his affidavit, without pointing to any facts, "That neither Mr. Monzon nor I had any intention to include the terms on the reverse of the form, nor was there any discussion of them."

The magistrate judge held that the affidavits, even if true, did not raise an issue of material fact regarding the interpretation or applicability of the terms of the written contracts. The district court accepted his recommendation to award summary judgment in D'Agostino's favor.

MCC appealed to the Court of Appeals for the Eleventh Circuit. That Court held that the CISG precluded summary judgment in this case because, despite the express inclusion of the reverse side by Monzon's signature directly beneath that recital, MCC had purportedly raised an issue of fact concerning the parties' subjective intent to be bound by the terms on the reverse of the order forms. The Court further held that the CISG precluded application of the parol evidence rule, which would otherwise have barred the consideration of MCC's affidavits. The Court reversed the district court's grant of summary judgment and remanded the case for further proceedings consistent with its opinion. 144 F.3d 1384.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PAROL EVIDENCE RULE IS INAPPLICABLE TO CONTRACTS GOVERNED BY THE CISG.

As the Court below noted in its opinion, the parol evidence rule prohibits the admission of evidence of prior or contemporaneous agreements or negotiations to contradict the terms of a writing, if the writing is either a partial or complete integration. 144 F.3d at 1388. Here, it is undisputed that the order forms in issue memorialized the parties' final and complete understanding as to at least some issues, and thus constituted partial integrations. MCC's affidavits, which assert that the parties never intended the items on the reverse of the forms to be included in the contract, directly contradict the clause on the front of the forms beneath which Monzon affixed his signature which recites that they are included.

At issue before the Court below was whether the CISG mandates the admissibility of parol evidence which contravenes the express written provisions of the contract.

The Court observed that the parol evidence rule is neither expressly adopted or rejected by the CISG. 144 F.3d at 1389. It acknowledged that there was a divergence in opinion among the federal courts as to whether the parol evidence rule applies to contracts governed by the CISG. In *Filanto v. Chilewich Int'l. Corp.*, 789 F. Supp. 1229, 1238 n. 7 (S.D.N.Y. 1992), the court tangentially opined in *dicta* that Article 8(3) "essentially rejects...the parol evidence rule."

However, the United States Court of Appeals for the Fifth Circuit, in a case less stark than this because the parol evidence there did not directly contravene a provision of the written contract, reached a conclusion diametrically opposite to that of the Eleventh Circuit in this case. It held that the parol evidence rule can apply to contracts governed by the CISG. *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 993 F.2d 1178 (5th Cir. 1993).

In *Beijing Metals,* the plaintiff, a Chinese corporation, brought suit to recover an amount which it claimed was due under a written payment agreement between the parties subject to the CISG. The defendant, American Business Center, Inc. ("ABC") contended that the written agreement reflected only a part of the total agreement. ABC asserted that plaintiff had breached two obligations on its part to which the parties had orally agreed. The district court held that the parol evidence rule prevented the alleged oral agreement from being a defense to ABC's obligations under the written payment agreement, and granted summary judgment to the plaintiff. 993 F.2d at 1182.

In affirming that aspect of the district court's order, the Fifth Circuit Court of Appeals noted that the parol evidence rule precludes the use of prior or contemporaneous oral agreements to vary, add to, or contradict terms of a fully integrated written instrument. Id. at 1182-1183. While the parties disputed whether Texas law or the law under the CISG should apply, the Court stated that "We need not resolve this choice of law issue because our discussion is limited to application of the parol evidence rule *(which applies regardless)....*" (*Id.* at 1183; emphasis added).[1]

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1. The divergence in opinion among the federal courts on the issue of the applicability of the parol evidence rule to contracts governed by the CISG is a

(continued...)

The Court below commented that the Fifth Circuit in *Beijing Metals* did not set forth its rationale for holding that the parol evidence rule applies to contracts governed by the CISG. Nevertheless, the Fifth Circuit's decision has sound conceptual underpinnings. It is important to note that when the CISG does not give special treatment to a rule of law, the rule is not automatically displaced. Article 7(2) of the CISG provides that questions concerning matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the rule of law applicable by virtue of the rules of private international law. The "general principles" underlying the CISG include the need to promote uniformity in its application and the observance of good faith in international trade. CISG Article 7(1).

Article 8(1) of the CISG directs the Court to determine the effect of a contract according to the parties' "intent". Article 8(3) directs the Court that "due consideration" is to be given to "all relevant circumstances" in determining that intent. The parol evidence rule implements these instructions. As the Court below noted, application of the parol evidence rule under the CISG may be viewed as a way to resolve the question, left unresolved by the CISG, of what constitutes "due consideration... to all relevant circumstances." 144 F.3d at

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(...continued)

continuing one. The decision of the Court below was recently followed by the United States District Court for the Northern District of Illinois, Eastern Division in *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F. Supp.2d 915 (1998) (holding that Article 8 requires the court to consider parol evidence inasmuch as that evidence is probative of the subjective intent of the parties); see also, *Claudia v. Olivieri Footwear Ltd.*, 1998 U.S. DIST. LEXIS 4586, at 18, No. 96 Civ. 80-52, 1998 WL 164824, at 5-6 (S.D.N.Y. April 6, 1998).

1390. The parol evidence rule thus becomes an evidentiary rule which enables the Court to comply with the directives of Article 8 to determine the parties' intent in contracting. CISG Article 7 dictates that issues such as this, which are governed but not expressly settled by the CISG, are to be settled in conformity with the general principles on which the CISG is based. In the absence of such principles, the CISG permits the courts to turn to domestic law. Where the domestic law conforms to the principles of the CISG, that law may provide the rule of decision. CISG Article 7(2).

The parol evidence rule clearly prevents a party from denying its express agreement. It furthers the expressed goals of the CISG by promoting predictability and certainty in international transactions and promotes the observance of good faith in international trade. The rule seeks to ensure that the parties' expectations and understandings as expressed in the writing will not be frustrated by claimed extrinsic evidence. Finally, it serves critical public policies by protecting written contracts against perjured or otherwise unreliable testimony of oral terms, and motivating the parties to put their complete agreement in writing. It was with these important public policies in mind that the Court in *Beijing Metals, supra,* 993 F.2d 1178 applied the parol evidence rule to exclude evidence of contemporaneous oral agreements. Said the Court:

> "Both the parol evidence rule and the doctrine of integration exist so that parties may rely on the enforcement of agreements that have been reduced to writing. If it were not for these established principles, even the most carefully considered written documents could be

> destroyed by 'proof' of other agreements not included in the writing." 993 F.2d at 1183.

The parol evidence rule is thus fully compatible with and furthers the underlying purposes of the CISG, as case law and commentators have found. See e.g., *Beijing Metals, supra*, 993 F.2d 1178; Ronald A. Brand & Harry M. Fletchner, *Recent Development: CISG: Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention,* 12 J.L. & Com. 239, 252 (1993) ("the basic principles behind the [parol evidence] rule remain viable under the Convention"); David H. Moore, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.,* 1995 Brigham Young L. Rev. 1347, 1351 ("the parol evidence rule is essentially an expression of C.I.S.G. article 8 and serves the international uniformity goal of article 7, so that the rule legitimately may be applied under the Convention....").

The applicability of the parol evidence rule to contracts governed by the CISG is indisputably of vital significance to international commerce. This provides good reason for this Court to grant certiorari to resolve this new issue and the conflict among the Circuit Courts of Appeals with respect to the issue. See e.g., *Braxton v. U.S.*, 500 U.S. 344 (1991).[2]

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2 . In holding the parol evidence rule inapplicable to contracts governed by the CISG, the Court below noted that "a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions." 144 F.3d at 1391. That other countries may have rejected the parol evidence rule in the context of *domestic* commercial disputes, is in no way probative of the issue of whether the CISG contemplates application of the rule.

II.
WHERE THE TERMS OF A CONTRACT GOVERNED BY THE CISG ARE CLEAR AND UNAMBIGUOUS, AS HERE, THERE IS NO NEED FOR "INTERPRETATION" AND ARTICLE 8 IS INAPPLICABLE.

Even assuming, *arguendo,* that the Court below was correct in holding that the parol evidence rule does not apply to contracts governed by CISG, this would not permit the use of alleged oral statements to directly contradict unambiguous terms of the written agreement. Article 8 permits courts to interpret the "statements...and other conduct of a party...according to his intent". Here there are no statements which require interpretation. No "interpretation" can delete the reverse side of a contract, especially where the party signs immediately below an express affirmation that the reverse side is part of the contract. The Court below observed that the affidavits submitted by MCC are:

> "relatively conclusory and unsupported by facts that would objectively establish MCC's intent not to be bound by the conditions on the reverse of the form".

That comment was most apt. It should have compelled the conclusion that MCC's affidavit "proof" interpreted nothing subjectively where there was nothing to interpret.

The authoritative commentators agree that Article 8 governs only how statements, or contracts, are to be "interpreted". It should not be perverted to permit express contractual provisions to be contradicted. See e.g., John

Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* at 105-107 (2d ed. 1991) (Article 8 concerns the interpretation of contracts, i.e., the construction of the language used by the parties in contracts and disputes over the meaning of the contractual language); *Harry Fletchner, Recent Developments: CISG: More U.S. Decisions on the U.N. Sales Convention: Scope, Parole Evidence, "Validity" and Reduction of Price Under Article 50*, 14 J.L. & COM. 153, 157 n. 16 (1995) (..."Article 8 deals only with the interpretation of the parties' agreement.")

The Circuit Court forthrightly agreed with the District Court that there is simply no room for interpretation of the clause which states that the:

> "buyer... is aware of the sales conditions stated on the reverse and that he expressly approves of them". 144 F.3d at 1388.

Nothing in the written contract or oral exchanges or conduct could possibly permit the conclusion that the terms on the reverse are not approved. Such a reading does not "interpret" the clause, but deletes it. The Circuit Court agreed with the magistrate judge's observation that such an approach

> "would render terms of written contracts virtually meaningless and severely diminish the reliability of commercial contracts." 144 F.3d at 1388.

That observation should have compelled affirmance of the District Court's dismissal of the complaint.

Accordingly, this Court should grant certiorari in order to instruct the lower Courts that Article 8 of the CISG is triggered only where there is an issue of subjective intent in interpretation of the contract. It should not be applied where, as here, there are no ambiguous contractual provisions to interpret.

III.

THE COURT BELOW ERRED IN IMPLICITLY HOLDING THAT FED. R. CIV. P. 56 MUST GIVE WAY TO THE CISG, AND IN PERMITTING CONCLUSORY AFFIDAVITS, UTTERLY DEVOID OF FACTS OR EVIDENCE, TO BE CONSIDERED AS EVIDENCE OF "INTENT".

Even assuming, *arguendo*, that parol evidence, such as the affidavits submitted by MCC, could properly be considered by the Court under the CISG, and that the text placed in issue, approving of written conditions on the reverse, was subject to "interpretation" by such evidence, an examination of the affidavits shows that, absent the CISG gloss, they create no issue of fact. Thus the interpretation of the CISG considerations undermines the policy under Fed. R. Civ. P. 56 encouraging the resolution of disputes by judgment where there is no genuine issue of fact. The affidavits are reprinted at page 45a *infra*. They consist of merely conclusory allegations unsupported by factual data. MCC failed to point to any contemporaneous statement or conduct on the part of Monzon, Copelli and Silingardi to show that it was their intention that the terms on the back of the proposals would not be binding. In fact, Monzon's unequivocal objective conduct in signing the contracts without hesitation or reservation indicated full assent to the contractual terms.

Clearly, absent some compulsion of the CISG, the Court of Appeals' decision contravenes the policy and the mandate of Rule 56 of the Federal Rules of Civil Procedure. Rule 56(e) requires, in a case such as this, that the nonmovant "set forth specific facts" demonstrating that it has sufficiently probative material in its favor to warrant further adjudication of the dispute. If the nonmovant fails to make this showing, summary judgment should be entered by the Court. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (once the moving party's burden is met, "the adverse party `must set forth specific facts showing there is a genuine issue for trial'" [quoting Fed. R. Civ. P. 56(e)]). Here, there is no question that the movant's presentation mandated the nonmovant to set forth a genuine factual controversy.

This Court in *Liberty Lobby* disapproved the "scintilla of evidence" test, and expressly applied the "substantial evidence" test. 11 Moore's Federal Practice, § 56.03[3] (3d Ed.). *Liberty Lobby* required that evidence opposing summary judgment be more than merely possible or colorable. The evidence must be sufficient to withstand a motion for directed verdict and support the verdict of a reasonable jury. 477 U.S. 242, 250-252.

It is abundantly clear that MCC's affidavits, in light of these principles, do not satisfy the Rule 56(e) mandate. Indeed, the Court below admitted as much in observing that the affidavits are:

> "relatively conclusory and unsupported by facts that would objectively establish MCC's intent not to be bound by the conditions on the reverse of the form".

The crux of Monzon's affidavit is his unsupported, conclusory statement, devoid of any facts, that he "had no intention" to abide by the terms of the contract. The Copelli affidavit is to the same effect saying:

> "...there was no intention on the part of either d'Agostino or Super Tiles for the terms printed on the reverse side of the d'Agostino order form to be incorporated in the requirements contract...."

The Gianni Silingardi affidavit stated he was Commercial Director of D'Agostino for approximately two years from late 1989 to early 1991, when he was fired by D'Agostino after Mr. Maselli in early 1991 became D'Agostino's General Manager. Silingardi's affidavit is a mirror image of that of Monzon and Copelli in its failure to point to any oral or written words or conduct to indicate that the reverse of the form was to be ignored.

Since neither Copelli nor Silingardi state any facts, it is immaterial that they were former employees of D'Agostino. Any statement by them, particularly, as hostile former employees, that there was "no intention" to incorporate the terms on the reverse side states no fact which meets Rule 56's standards.

Self-serving, factually unsupported and conclusory statements as to subjective intent simply do not suffice to avoid entry of summary judgment. *See Klopfenstein v. Pargeter*, 597 F.2d 150, 152 (9th Cir. 1979) (affirming summary judgment despite the appellant's submission of his own affidavit regarding his subjective intent: "Undisclosed, subjective intentions are immaterial in [a] commercial

transaction, especially when contradicted by objective conduct. Thus the affidavit has no legal effect even if its averments are accepted as wholly truthful.") The attempt by the Court below to distinguish *Klopfenstein* by suggesting that "both parties to the contract acknowledge a subjective intent not to be bound" by the reverse side must fail. There is no evidence by written or oral word or by conduct that at the time there was any such intent. In any event, it is erroneous to consider the post-termination affidavit of a fired former employee as the acknowledgment of a party. See 5 Weinstein's Federal Evidence §801.23[1] (2d Ed.).[3]

It follows that the MCC affidavits, as found by the Magistrate Judge and the District Judge, were totally insufficient and could not defeat D'Agostino's right to summary judgment.

The policy encouraging federal courts to make full use of Rule 56 is now well established. This Court's 1986 "Trilogy" of summary judgment cases *(Matushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 [1986]; *Liberty Lobby, supra*, 447 U.S. 242; *Celotex v. Catrett*, 477 U.S. 317 [1986]), significantly strengthened Rule 56 and substantially increased its use in the federal courts. The Court's encouragement of full use of Rule 56 reflects a program to strengthen case management and resolution. 11 Moore's Federal Practice, § 56.03[1], p. 56-24.

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3 . It is notable that the very same terms included in the October 4, 1990 order form were included in numerous other order forms signed without comment by MCC, including the January 15, 1991 order proposal and two order proposals dated May 4, 1991. None of the MCC affidavits disputes these other order forms which Monzon signed. Thus, no genuine issue of material fact was raised as to the terms of the other order proposals not referred to in the affidavits.

In *Celotex, supra,* 477 U.S. 317, 327, this Court stated:

> "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action' [quoting Rule 1]....Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis."

Nothing supports the thesis that CISG mandates that Rule 56 be eviscerated to allow conclusory, non-factual statements.

Article 8(1) of the CISG provides that "*statements* made by *and other conduct* of a party are interpreted according to his intent where the other party knew or could not have been unaware what that intent was." (Emphasis added). Thus, Article 8 is similar to rule 56(e) in that it requires showing of *objective facts.* CISG Article 8(3) provides that, in determining the subjective "intent" of a party, "due consideration is to be given to all relevant circumstances

of the case including the negotiations, any practice which the parties have established between themselves, usages and any subsequent conduct of the parties." The "negotiations", the parties' "practice" and "usages" and "subsequent conduct" are all *objective* factors which require a specific factual showing.

Indeed, the stated goal of CISG to promote certainty and predictability in international commercial transactions is undermined by this vacuous type of affidavit. The "general principles" underlying the CISG include the need to promote the observance of good faith and uniformity in international trade. CISG Article 7(1). As the Court below noted, a primary factor motivating the adoption of CISG was to provide parties to international contracts for the sale of goods with "some degree of certainty" with respect to how potential disputes would be determined. See Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, reprinted at 15 U.S.C. Appendix pp. 362-3 (1998). The goals of promoting certainty in the marketplace and efficiency in dispute resolution are not furthered by permitting a party to avoid the clear terms of a contract by proffering a conclusory affidavit from a disgruntled ex-employee of the other party which is at war with a clear, unambiguous writing. This type of "evidence" can only open the floodgates of litigation with respect to transactions governed by the CISG, which could not have been intended by the Senate when it confirmed the treaty.

Respectfully, no basis exists for judicial imprimatur of the type of conclusory, fact-devoid affidavit submitted by Respondent. The Circuit Court's decision subordinating Rule 56 to the CISG where the two are not inconsistent with one another conflicts with strong policy in favor of use of summary judgment and is unwarranted by any doctrinal authority.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX A
ORDER DENYING REHEARING, *CERAMICA NUOVA D'AGOSTINO S.p.A. v. MCC-MARBLE CERAMIC CENTER, INC.* (NOVEMBER 6, 1998)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MCC - MARBLE CERAMIC CENTER, INC.,
d.b.a Super Tiles & Marble,
Plaintiff-Counter-Defendant,
Appellant,

versus

CERAMICA NUOVA D'AGOSTINO, S.P.A.,
Defendant-Counter-Claimant,
Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: EDMONDSON and BIRCH, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellee Ceramica Nuova D'Agostino, S.P.A., is DENIED.

ENTERED FOR THE COURT:
s/
UNITED STATES CIRCUIT JUDGE

APPENDIX B
CERAMICA NUOVA D'AGOSTINO S.p.A. v. MCC-MARBLE CERAMIC CENTER, INC.,
144 F.3d 1384 (11th CIR. 1998)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4250

D.C. Docket No. 92-2108-CIV

MCC-MARBLE CERAMIC CENTER, INC.,
Plaintiff-Counter-Defendant-Appellant,

versus

CERAMICA NUOVA D'AGOSTINO, S.P.A.,
Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 29, 1998)

Before EDMONDSON and BIRCH, Circuit Judges and FAY, Senior Circuit Judge.

This case requires us to determine whether a court must consider parol evidence in a contract dispute governed by the United Nations Convention on Contracts for the

International Sale of Goods ("CISG").(1) The district court granted summary judgment on behalf of the defendant-appellee, relying on certain terms and provisions that appeared on the reverse of a pre-printed form contract for the sale of ceramic tiles. The plaintiff-appellant sought to rely on a number of affidavits that tended to show both that the parties had arrived at an oral contract before memorializing their agreement in writing and that they subjectively intended not to apply the terms on the reverse of the contract to their agreements. The magistrate judge held that the affidavits did not raise an issue of material fact and recommended that the district court grant summary judgment based on the terms of the contract. The district court agreed with the magistrate judge's reasoning and entered summary judgment in the defendant-appellee's favor. We REVERSE.

BACKGROUND

The plaintiff-appellant, MCC-Marble Ceramic, Inc. ("MCC"), is a Florida corporation engaged in the retail sale of tiles, and the defendant-appellee, Ceramica Nuova d'Agostino S.p.A. ("D'Agostino") is an Italian corporation engaged in the manufacture of ceramic tiles. In October 1990, MCC's president, Juan Carlos Mozon, met representatives of D'Agostino at a trade fair in Bologna, Italy and negotiated an agreement to purchase ceramic tiles from D'Agostino based on samples he examined at the

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1. United Nations Convention on Contracts for the International Sale of Goods, opened for signature April 11, 1980, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. 22 (1983), 19 I.L.M. 671, reprinted at, 15 U.S.C. app. 52 (1997).

trade fair. Monzon, who spoke no Italian, communicated with Gianni Silingardi, then D'Agostino's commercial director, through a translator, Gianfranco Copelli, who was himself an agent of D'Agostino.(2) The parties apparently arrived at an oral agreement on the crucial terms of price, quality, quantity, delivery and payment. The parties then recorded these terms on one of D'Agostino's standard, pre-printed order forms and Monzon signed the contract on MCC's behalf. According to MCC, the parties also entered into a requirements contract in February 1991, subject to which D'Agostino agreed to supply MCC with high grade ceramic tile at specific discounts as long as MCC purchased sufficient quantities of tile. MCC completed a number of additional order forms requesting tile deliveries pursuant to that agreement.

MCC brought suit against D'Agostino claiming a breach of the February 1991 requirements contract when D'Agostino failed to satisfy orders in April, May, and August of 1991. In addition to other defenses, D'Agostino responded that it was under no obligation to fill MCC's orders because MCC had defaulted on payment for previous shipments. In support of its position, D'Agostino relied on the pre-printed terms of the contracts that MCC had executed. The executed forms were printed in Italian and contained terms and conditions on both the front and reverse. According to

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2. Since this case is before us on summary judgment, we consider the facts in the light most favorable to MCC, the non-moving party, and grant MCC the benefit of every factual inference. See Welch v. Celotex Corp., 951 F.2d 1235, 1237 (11th Cir. 1992).

an English translation of the October 1990 contract, (3) the front of the order form contained the following language directly beneath Monzon's signature:

[T]he buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-6-7-8.

R2-126, Exh. 3 paragraph 5 ("Maselli Aff."). Clause 6(b), printed on the back of the form states:

[D]efault or delay in payment within the time agreed upon gives D'Agostino the right to . . . suspend or cancel

Id. paragraph 6.

D'Agostino also brought a number of counterclaims against MCC, seeking damages for MCC's alleged nonpayment for deliveries of tile that D'Agostino had made between February 28, 1991 and July 4, 1991. MCC responded that the tile it had received was of a lower quality than contracted for, and that, pursuant to the CISG, MCC was entitled to reduce payment in proportion to the defects.(4) D'Agostino, however, noted that clause 4 on the reverse of the contract states, in pertinent part:

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3. D'Agostino provided the translation of the contract. MCC has never contested its accuracy.

4. Article 50 of the CISG permits a buyer to reduce payment for nonconforming goods in proportion to the nonconformity under certain conditions. See CISG, art. 50.

Possible complaints for defects of the merchandise must be made in writing by means of a certified letter within and not later than 10 days after receipt of the merchandise. . . .

Maselli Aff. paragraph 6. Although there is evidence to support MCC's claims that it complained about the quality of the deliveries it received, MCC never submitted any written complaints.

MCC did not dispute these underlying facts before the district court, but argued that the parties never intended the terms and conditions printed on the reverse of the order form to apply to their agreements. As evidence for this assertion, MCC submitted Monzon's affidavit, which claims that MCC had no subjective intent to be bound by those terms and that D'Agostino was aware of this intent. MCC also filed affidavits from Silingardi and Copelli, D'Agostino's representatives at the trade fair, which support Monzon's claim that the parties subjectively intended not to be bound by the terms on the reverse of the order form. The magistrate judge held that the affidavits, even if true, did not raise an issue of material fact regarding the interpretation or applicability of the terms of the written contracts and the district court accepted his recommendations to award summary judgment in D'Agostino's favor. MCC then filed this timely appeal.

DISCUSSION

We review a district court's grant of summary judgment de novo and apply the same standards as the district court. See Harris v. H&W Contracting Co., 102 F.3d 516, 518 (11th Cir. 1996). Summary judgment is appropriate when the

pleadings, depositions, and affidavits reveal that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

The parties to this case agree that the CISG governs their dispute because the United States, where MCC has its place of business, and Italy, where D'Agostino has its place of business, are both States Party to the Convention(5)-See CISG, art. 1.(6) Article 8 of the CISG governs the interpretation of international contracts for the sale of goods and forms the basis of MCC's appeal from the district court's

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5. The United States Senate ratified the CISG in 1986, and the United States deposited its instrument of ratification at the United Nations Headquarters in New York on December 11, 1986. See Preface to Convention, reprinted at 15 U.S.C. app. 52 (1997). The Convention entered into force between the United States and the other States Parties, including Italy, on January 1, 1988. See id.; Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

6. Article 1 of the CISG states in relevant part:

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States.

(a) When the States are Contracting States. . . .

CISG, art. 1.

grant of summary judgment in D'Agostino's favor.(7) MCC argues that the magistrate judge and the district court improperly ignored evidence that MCC submitted regarding the parties' subjective intent when they memorialized the terms of their agreement on D'Agostino's pre-printed form contract, and that the magistrate judge erred by applying the patrol evidence rule in derogation of the CISG.

Subjective Intent Under the CISG

Contrary to what is familiar practice in United States courts, the CISG appears to permit a substantial inquiry into the parties' subjective intent, even if the parties did not engage

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7. Article 8 provides:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and conduct of a party are to be interpreted according to the understanding a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

CISG, art. 8.

in any objectively ascertainable means of registering this intent.(8) Article 8(1) of the CISG instructs courts to interpret the "statements . . . and other conduct of a party . . . according to his intent" as long as the other party "knew or could not have been unaware" of that intent. The plain language of the Convention, therefore, requires an inquiry into a party's subjective intent as long as the other party to the contract was aware of that intent.

In this case, MCC has submitted three affidavits that

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8. In the United States, the legislatures, courts, and the legal academy have voiced a preference for relying on objective manifestations of the parties' intentions. For example, Article Two of the Uniform Commercial Code, which most states have enacted in some form or another to govern contracts for the sale of goods, is replete with references to standards of commercial reasonableness. See e.g., U.C.C. § 2-206 (referring to reasonable means of accepting an offer); see also Lucy v. Zehmer, 196 Va. 493, 503, 84 S.E.2d 516, 522 (1954) ("Whether the writing signed ... , was the result of a serious offer ... and a serious acceptance ..., or was a serious offer ... and an acceptance in secret jest ..., in either event it constituted a binding contract of sale between the parties."). Justice Holmes expressed the philosphy behind this focus on the objective in forceful terms: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct." Oliver W. Holmes, The Common Law 242 (howe ed. 1963) quoted in John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention § 107 at 164 (2d 3d. 1991) (hereinafter Honnold, Uniform Law)

discuss the purported subjective intent of the parties to the initial agreement concluded between MCC and D'Agostino in October 1990. All three affidavits discuss the preliminary negotiations and report that the parties arrived at an oral agreement for D'Agostino to supply quantities of a specific grade of ceramic tile to MCC at an agreed upon price. The affidavits state that the "oral agreement established the essential terms of quality, quantity, description of goods, delivery, price and payment." See R3-133 paragraph 9 ("Silingardi Aff."); R1-51 paragraph 7 ("Copelli Aff."); R1-47 paragrpah 7 ("Monzon Aff."). The affidavits also note that the parties memorialized the terms of their oral agreement on a standard D'Agostino order form, but all three affiants contend that the parties subjectively intended not to be bound by the terms on the reverse of that form despite a provision directly below the signature line that expressly and specifically incorporated those terms.(9)

9. MCC makes much of the fact that the written order form is entirely in Italian and that Monzon, who signed the contract on MCC's behalf directly below this provision incorporating the terms on the reverse of the form, neither spoke nor read Italian. This fact is of no assistance to MCC's position. We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the proposition that parties who sign contracts will be bound by them regardless of whether they have read them or understood them. See e.g., Samson Plastic Conduit and Pipe Corp. v. Battenfeld Extrusionstechnik GMBH, 718 F.Supp. 886, 890 (M.D. Ala. 1989) ("A good and recurring illustration of the problem . . . involves a person who is . . . unfamiliar with the language in which a contract is written and who has signed a document which was not read to him. There is all but unanimous agreement that he is bound. . . .")

The terms on the reverse of the contract give D'Agostino the right to suspend or cancel all contracts in the event of a buyer's non-payment and require a buyer to make a written report of all defects within ten days. As the magistrate judge's report and recommendation makes clear, if these terms applied to the agreements between MCC and D'Agostino, summary judgment would be appropriate because MCC failed to make any written complaints about the quality of tile it received and D'Agostino has established MCC's non-payment of a number of invoices amounting to 108,389.40 and $102,053,846.00 Italian lira.

Article 8(1) of the CSIG requires a court to consider this evidence of the parties' subjective intent. Contrary to the magistrate judge's report, which the district court endorsed and adopted, article 8(1) does not focus on interpreting the parties statements alone. Although we agree with the magistrate judge's conclusion that no "interpretation" of the contract's terms could support MCC's position,(10) article 8(1) also requires a court to consider subjective intent while interpreting the conduct of the parties. The CISG's language, therefore, requires courts to consider evidence of a party's subjective intent when signing a contract if the other party to the contract was aware of that intent at the time. This is precisely the type of evidence that MCC has provided through the Silingardi, Copelli, and Monzon affidavits, which

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10. The magistrate judge's report correctly notes that MCC has not sought an interpretation of those terms, but rather to exclude them altogether. We agree that such an approach "would render terms of written contracts virtually meaningless and severely diminish the reliability of commercial contracts." R2-102 at 5-6.

discuss not only Monzon's intent as MCC's representative but also discuss the intent of D'Agostino's representatives and their knowledge that Monzon did not intend to agree to the terms on the reverse of the form contract. This acknowledgment that D'Agostino's representatives were aware of Monzon's subjective intent puts this case squarely within article 8(1) of the CISG, and therefore requires the court to consider MCC's evidence as it interprets the parties' conduct.(11)

II. Parol Evidence and the CISG

Given our determination that the magistrate judge and the district court should have considered MCC's affidavits regarding the parties' subjective intentions, we must address a question of first impression in this circuit: whether the parol evidence rule, which bars evidence of an earlier oral contract that contradicts or varies the terms of a subsequent or contemporaneous written contract,(12) plays any role in cases

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11. Without this crucial acknowledgment, we would interpret the contract and the parties' actions according to article 8(2), which directs courts to rely on objective evidence of the parties' intent. On the facts of this case it seems readily apparent that MCC's affidavits provide no evidence that Monzon's actions would have made his alleged subjective intent not to be bound by the terms of the contract known to "the understanding that a reasonable person . . . would have had in the same circumstances." CISG, art 8(2).

12. The Uniform Commercial Code includes a version of the parol evidence rule applicable to contracts for the sale of goods in most states:

{footnote continued on next page}

involving the CISG. We begin by observing that the parol evidence rule, contrary to its title, is a substantive rule of law, not a rule of evidence. See II E. Allen Farnsworth, Farnsworth on Contracts, section 72 at 194 (1990). The rule does not purport to exclude a particular type of evidence as an "untrustworthy or undesirable" way of proving a fact, but prevents a litigant from attempting to show "the fact itself—the fact that the terms of the agreement are other than those in the writing." Id. As such, a federal district court cannot simply apply the parol evidence rule as a procedural matter—as it might if excluding a particular type of evidence under the Federal Rules of Evidence, which apply in federal court regardless of the source of the substantive rule of decision. Cf. id. section 7.2 at 196.(13)

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Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included hterein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade . . . or by course of performance . . . ; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

U.C.C. section 2-202.

13. An example demonstrates this point. The CISG provides that a contract for the sale of goods need not be in writing and that the
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The CISG itself contains no express statement on the role of parol evidence. See Honnold, Uniform Law Section 110 at 170. It is clear, however, that the drafters of the CISG were comfortable with the concept of permitting parties to rely on oral contracts because they eschewed any statutes of fraud provision and expressly provided for the enforcement of oral contracts. Compare CISG, art. 11 (a contract of sale need not be concluded or evidenced in writing) with U.C.C. Section 2-201 (precluding the enforcement of oral contracts for the sale of goods involving more than $500). Moreover, article 8(3) of the CISG expressly directs courts to give "due consideration . . . to all relevant circumstances of the case including the negotiations. . ." to determine the intent of the parties. Given article 8(1)'s directive to use the intent of the parties to interpret their statements and conduct, article 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent.

Despite the CISG's broad scope, surprisingly few cases have

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parties may prove the contract "by any means, including witnesses." CISG, art. 11. Nevertheless, a party seeking to prove a contract in such a manner in federal court could not do so in a way that violated in the rule against hearsay. See Fed. R. Evid. 802 (barring hearsay evidence). A federal district court applies the Federal Rules of Evidence because these rules are considered procedural, regardless of the source of the law that governs the substantive decision. Cf. Farnsworth on Contracts section 7.2 at 196 & n. 16 (citing vcases).

applied the Convention in the United States,(14) see Delhi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027-28 (2d Cir. 1995) (observing that "there is virtually no case law under the Convention"), and only two reported decisions touch upon the parol evidence rule, both in dicta. One court has concluded, much as we have above, that the parol evidence rule is not viable in CISG cases in light of article 8 of the Convention. In Filanto, a district court addressed the differences between the UCC and the CISG on the issues of offer and acceptance and the battle of the forms. See 789 F.Supp. at 1238. After engaging in a thorough analysis of how the CISG applied to the dispute before it, the district court tangentially observed that article 8(3) "essentially rejects . . . the parol evidence rule." Id. at 1238 n.7. Another court, however, appears to have arrived at a contrary conclusion. In Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178 (5th Cir. 1993), a defendant sought to avoid summary judgment on a contract claim by relying on evidence of contemporaneously negotiated oral terms that the parties had not included in their written agreement. The plaintiff, a Chinese corporation, relied on Texas law in its complaint while the defendant, apparently a Texas corporation,(15) asserted that the CISG

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14. Moreover, the parties have not cited us to any persuasive authority from the courts of other States Party to the CISG. Our own research uncovered a promising source for such decisions at <http://www.cisg.law.pace.edu>, but produced no cases that address the issue of parol evidence.

15. The Beijing Metals opinion does not state the place of the defendant's incorporation, but the defendant must have been a United States corporation because the court noted that the case

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governed the dispute. Id. at 1183 n.9. Without resolving the choice of law question,(16) the Fifth Circuit cited Filanto for the proposition that there have been very few reported cases applying the CISG in the United States, and stated that the parol evidence rule would apply regardless of whether Texas law or the CISG governed the dispute. Beijing Metals, 993 F.2d at 1183 n.9. The opinion does not acknowledge Filanto's more applicable dictum that the parol evidence rule does not apply to the CISG cases nor does it conduct any analysis of the Convention to support its conclusion. In fact, the Fifth Circuit did not undertake to interpret the CISG in a manner that would arrive at a result consistent with the parol evidence rule but instead explained that it would apply the rule as developed at Texas common law. See id. at 1183 n.10. As persuasive authority for this court, the Beijing Metals opinion is not particularly persuasive on this point.

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was a "diversity action." Beijing Metals, 993 F.2d at 1183 n.9. Cf. 28 U.S.C. section 1332 (providing no statutory grant for suits between aliens unless a citizen of a State is present); 15 James W. Moore, Moore's Federal Practice section 102.77 (3d ed. 1998) (observing that diversity jurisdiction is not present in suits between two foreign citizens).

16. The Fifth Circuit unwittingly may have solved the problem in the very next footnote, where it observed that the agreement between the parties, which attempted to settle a dispute regarding an earlier sales contract, was not itself a contract for the sale of goods and therefore fell outside the Uniform Commercial Code. Beijing Metals, 993 F.2d at 1183 n.10. See CISG, art. 1(1) ("This Convention applies to contracts of sale of goods. . . .") (emphasis added).

Our reading of article 8(3) as a rejection of the parol evidence rule, however, is in accordance with the great weight of academic commentary on the issue. As one scholar has explained:

[T]he language of Article 8(3) that "due consideration is to be given to all relevant circumstances of the case" seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements. . . . Article 8(3) relieves tribunals from domestic rules that might bar them from "considering" any evidence between the parties that is relevant. This added flexibility for interpretation is consistent with a growing body of opinion that the "parol evidence rule" has been an embarrassment for the administration of modern transactions.

Honnnold, Uniform Law section 110 at 170-71.(17) Indeed,

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17. See also Louis F. Del Duca, et al., Sales Under the Uniform Commercial Code and the Convention on International Sale of Goods, 173-74 (1993); Henry D. Gabriel, A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code, 7 Ind. Int'l & Comp. L. Rev. 279, 281 (1997) ("Subjective intent is given primary consideration . . . [Article 8] allows open-ended reliance on parol evidence. . . ."); Herbert Berstein & Joseph Lookofsky, Understanding the CISG in Europe 29 (1997) ("[T]he CISG has dispensed with the parol evidence rule which might otherwise operate to exclude extrinsic evidence under the law of certain Common Law countries."); Harry M. Fletchner, Recent Developments: CISG, 14 J.L. & Com. 153, 157 (1995) (criticizing the Beijing Metals opinion and nothing that "[c]ommentators generally agree that article 8(3) rejects the

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only one commentator has made any serious attempt to reconcile the parol evidence rule with the CISG. See David H. Moore, Note, The Patrol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 1995 BYU L. Rev. 1347. Moore argues that the parol evidence rule often permits the admission of evidence discussed in article 8(3), and that the rule could be an appropriate way to discern what consideration is "due" under article 8(3) to evidence of a parol nature. Id. at 1361-63. He also argues that the parol evidence rule, by limiting the incentive for perjury and pleading prior understandings in bad faith, promotes good faith and uniformity in the interpretation of contracts and therefore is in harmony with the principles of the CISG, as expressed in article 7.(18) Id. at 1366-70. The answer to both

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approach to the parol evidence questions taken by U.S. domestic law.") (collecting authority); John E. Murray, Jr., An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods, 8 J.L. & Com. 11, 12 (1988) ("We are struck by a new world where there is . . . no parol evidence rule, among other differences."); Peter Winship, Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention, 37 Loy. L. Rev. 43, 57 (1991).

18. Article 7 of the CISG provides in pertinent part:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
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these arguments, however, is the same: although jurisdictions in the United States have found the parol evidence rule helpful to promote good faith and uniformity in contract, as well as an appropriate answer to the question of how much consideration to give parol evidence, a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions. One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. See Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, reprinted at 15 U.S.C. app. 70, 71 (1997). Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

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(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based. . . .

CISG, art. 7.

This is not to say that parties to an international contract for the sale of goods cannot depend on written contracts or that parol evidence regarding subjective contractual intent need always prevent a party relying on a written agreement from securing summary judgment. To the contrary, most cases will not present a situation (as exists in this case) in which both parties to the contract acknowledge a subjective intent not to be bound by the terms of a pre-printed writing. In most cases, therefore, article 8(2) of the CISG will apply, and objective evidence will provide the basis for the court's decision. See Honnold, Uniform Law section 107 at 164-65. Consequently, a party to a contract governed by the CISG will not be able to avoid the terms of a contract and force a jury trial simply by submitting an affidavit which states that he or she did not have the subjective intent to be bound by the contract's terms. Cf. Klopfenstein v. Pargeter, 597 F.2d 150, 152 (9th Cir. 1979) (affirming summary judgment despite the appellant's submission of his own affidavit regarding his subjective intent: "Undisclosed, subjective intentions are immaterial in [a] commercial transaction, especially when contradicted by objective conduct. Thus, the affidavit has no legal effect even if its averments are accepted as wholly truthful."). Moreover, to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing.(19)

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19. See Ronald A. Brand & Harry M. Fletchner, Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention, 12 J.L. & Com. 239, 252 (1993) (arguing that article 8(3) of the CISG will not permit the consideration of parol evidence when the parties have expressly

[footnote continued on next page]

Considering MCC's affidavits in this case, however, we conclude that the magistrate judge and the district court improperly granted summary judgment in favor or D'Agostino. Although the affidavits are, as D'Agostino observes, relatively conclusory and unsupported by facts that would objectively establish MCC's intent not to be bound by the conditions on the reverse of the form, article 8(1) requires a court to consider evidence of a party's subjective intent when the other party was aware of it, and the Silingardi and Copelli affidavits provide that evidence. This is not to say that the affidavits are conclusive proof of what the parties intended. A reasonable finder of fact, for example, could disregard testimony that purportedly sophisticated international merchants signed a contract without intending to be bound as simply too incredible to believe and hold MCC to the conditions printed on the reverse of the contract.(20) Nevertheless, the affidavits raise an issue of

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[footnote continued from preceeding page]
excluded oral modifications of the contract pursuant to article 29); see also 1 Albert Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods 125 (1989) (counseling the use of a merger clause to compensate for the absence of a parol evidence rule in the CISG).

20. D'Agostino attempts to explain and undermine the affidavit of its representatives during the transaction, by calling Silingardi a "disgruntled" former employee. Appellee's Br. at 11, 39. Silingardi's alleged feelings towards his former employer may indeed be relevant to undermine the credibility of his assertions, but that is a matter for the finder of fact, not for this court on summary judgment.

material fact regarding the parties' intent to incorporate the provisions on the reverse of the form contract. If the finder of fact determines that the parties did not intend to rely on those provisions, then the more general provisions of the CISG will govern the outcome of the dispute.(21)

MCC's affidavits, however, do not discuss all of the transactions and orders that MCC placed with D'Agostino. Each of the affidavits discusses the parties' subjective intent surrounding the initial order MCC placed with D'Agostino in October 1990. The Copelli affidavit also discusses a February 1991 contract between the parties and reports that the parties subjectively did not intend the terms on the reverse of the D'Agostino order form to apply to that contract either. See Copelli Aff. paragraph 12. D'Agostino, however, submitted the affidavit of its chairman, Vincenzo Maselli, which describes at least three other orders from MCC on form

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21. Article 50, which permits a buyer to reduce payment to a seller who delivers nonconforming goods, and article 39, which deprives the buyer of that right if the buyer fails to give the seller notice specifying the defect in the goods delivered within a reasonable time, will be of primary importance. Although we may affirm a district court's grant of summary judgment if it is correct for any reason, even if not relied upon below, see United States v. $121,100.00 in United States Currency, 999 F.2d 1503, 1507 (11th Cir. 1993), and the parties have touched upon these articles in their briefs, they have not provided us with sufficient information to resolve their dispute under the CISG. MCC's affidavits indicate that MCC may have complained about the quality of the tile D'Agostino delivered, but they have provided no authority regarding what constitutes a reasonable time for such a complaint in this context. Accordingly, we decline to affirm the district court's grant of summary judgment on this basis.

contracts dated January 15, 1991, April 27, 1991, and May 4, 1991, in addition to the October 1990 contract. See Maselli Aff. paragraph 2, 25. MCC's affidavits do not discuss the subjective intent of the parties to be bound by language in those contracts, and D'Agostino, therefore, argues that we should affirm summary judgment to the extent damages can be traced to those order forms. It is unclear from the record, however, whether all of these contracts contained the terms that appeared in the October 1990 contract.(22) Moreover, because article 8 requires a court to consider any "practices which the parties have established between themselves, usages and any subsequent conduct of the parties" in interpreting contracts, CISG, art. 8(3), whether the parties intended to adhere to the ten day limit for complaints, as stated on the reverse of the initial contract, will have an impact on whether MCC was bound to adhere to the limit on subsequent deliveries. Since material issues of fact remain regarding the interpretation of the remaining contracts between MCC and D'Agostino, we cannot affirm any portion of the district court's summary judgment in D'Agostino's favor.

CONCLUSION

MCC asks us to reverse the district court's grant of summary judgment in favor of D'Agostino. The district court's

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22. The Maselli affidavit claims that at the February 4, 1991 contract contained the terms in question, see Maselli Aff. paragraphs 5-6, but MCC argues that at least some of the forms were never translated into English and, therefore, the record does not reveal whether the terms appear in all the contracts. We leave the resolution of these matters to the district court on remand.

decision rests on pre-printed contractual terms and conditions incorporated on the reverse of a standard order form that MCC's president signed on the company's behalf. Nevertheless, we conclude that the CISG, which governs international contracts for the sale of goods, precludes summary judgment in this case because MCC has raised an issue of material fact concerning the parties' subjective intent to be bound by the terms on the reverse of the pre-printed contract. The CISG also precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement. Accordingly, we REVERSE the district court's grant of summary judgment and REMAND this case for further proceedings consistent with this opinion.

APPENDIX C
ORDER ISSUED AS MANDATE, *CERAMICA NUOVA D'AGOSTINO S.p.A. v. MCC-MARBLE CERAMIC CENTER, INC.* (NOVEMBER 16, 1998)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4250

District Court No. 92-2108-CIV

MCC - MARBLE CERAMIC CENTER, INC.,

Plaintiff-Counter-Defendant-Appellant,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P. A.,

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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Before EDMONDSON and BIRCH, Circuit Judges, and FAY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by this Court that the judgment of the

said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-counter-claimant, appellee pay to plaintiff-counter-defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 29, 1998
For the Court: Thomas K. Kahn, Clerk

By: S/
Deputy Clerk

ISSUED AS MANDATE: November 16, 1998

APPENDIX D
ORDERS OF UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF FLORIDA GRANTING SUMMARY JUDGMENT, *CERAMICA NUOVA D'AGOSTINO S.p.A. V. MCC-MARBLE CERAMIC CENTER, INC.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2108-CIV-KEHOE

MCC - MARBLE CERAMIC CENTER, INC.,d/b/a SUPER TILES & MARBLES,
Plaintiff,

-against- ORDER

CERAMICA NUOVA D'AGOSTINO, S. P.A.,
Defendant.

FOR THE REASONS stated in the Report and Recommendation of the United States Magistrate Judge, and following an independent review of the file and a hearing in the matter, it is

ORDERED AND ADJUDGED that the Defendant's motion for a summary judgment is GRANTED as to Counts I and III of the Second Amended Complaint and the counter-claim. While acknowledging the consequence of this ruling, based on a review of the applicable case and statutory law, the Court must agree with the Magistrate Judge that:

> Article 8 [of the United Nations Convention] cannot be read to give binding effect to a contracting party's intentions when they contradict the explicit and unambiguous terms of a signed contract. To do so would render terms of written contracts virtually meaningless and severely diminish the reliability of commercial contracts.

See, inter alia, the legal principle in *Klopfenstein v. Pargeter*, 597 F.2D 150, 151 (9th Cir. 1979).

Done and ordered IN Chambers at Miami, Dade County, Florida, this 22nd day of August, 1995.

S/
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

Copies furnished to:
John H. Patterson, Esq.
Daniel L. Koch, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2108-CIV-KEHOE

MCC - MARBLE CERAMIC CENTER, INC., etc.,
Plaintiff,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P.A.,
Defendant.

ORDER ON MOTION TO DISMISS AND SECOND MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon the alternative motion of the Defendant [Docket No.: 126] (i) to dismiss the remaining count of the complaint (Count II) for want of prosecution, or (iii) for summary judgment.

After a review of the alternative motion, the response and reply thereto, and the file generally, it is

ORDERED AND ADJUDGED that the motion for summary judgment (Second Motion for Summary Judgment) [Docket No.: 126] is GRANTED.[1] See, in particular the Defendant's reply memorandum in Support of its motion (bottom paragraph, at page three, *et seq.*) See also the Court's order [Docket No.: 125] adopting the report and recommendation of the magistrate judge [Docket No.: 102].

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1. The motion to dismiss Count II for want of persecution is DENIED as *moot*.

DONE AND ORDERED in Chambers in Miami,

Florida, this 3rd day of December, 1996

S/
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

Copies furnished to:
John H. Patterson, Esq.
Daniel L. Koch, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2108-CIV-KEHOE

MCC - MARBLE CERAMIC CENTER, INC., etc.,
Plaintiff,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P.A.,
Defendant.

SUMMARY JUDGMENT

PURSUANT TO the Order on Motion to dismiss and Second Motion for Summary Judgment entered this date, it is

ORDERED AND ADJUDGED that a SUMMARY JUDGMENT on Count II of the Complaint is hereupon ENTERED in favor of the Defendant, for which let execution issue.

DONE AND ORDERED in Chambers in Miami, Florida, this 3rd day of December, 1996.

S/
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

Copies furnished to:
John H. Patterson, Esq.
Daniel L. Koch, Esq.

APPENDIX E
REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE GERBER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2108-CIV-KEHOE

MCC - MARBLE CERAMIC CENTER, INC.,
d/b/a, SUPER TILES & MARBLE,
Plaintiff,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P.A.,
Defendant.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Defendant/Counter-Plaintiff Ceramica Nuova D'Agostino 's ("Ceramica Nuova") Motion for Summary Judgment(DE 27).

BACKGROUND

Plaintiff MCC-Marble Ceramic, Inc. ("MCC") brings this suit alleging that in April, May, and August of 1991, Defendant Ceramica Nuova failed to fill orders for tile placed by MCC in contravention of a February 1991 requirements contract between the two parties. Ceramica Nuova asserts that it was not obligated to fill the three orders because MCC had defaulted on payment for previous orders. The front of each order form, signed by MCC's president, contained the

following language[1]:

[T]he buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-7-8.

Clause 6(b), printed on the back of the order form states:

> [D]efault or delay in payment within the time agreed upon gives [Ceramica Nuova] D'Agostino the right to . . . cancel the contract itself and to cancel possible other pending contracts and the buyer does not have the right to any indemnification or damages.

Ceramica Nuova seeks summary judgment not only with respect to MCC's Second Amended Complaint, but also on its counter-claim. Ceramica Nuova's counterclaim seeks payment for goods ordered and received by MCC. MCC claims that the goods it received were nonconforming and therefore full payment was not required. Ceramica Nuova, however, asserts that MCC failed to comply with contractual provisions regarding complaints about the quality of the goods and therefore cannot rely on alleged defects to avoid full payment. Clause 4, on the reverse of the order forms reads, in part:

> Possible complaints for defects of the merchandise must be made in writing by means of a certified

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1. The order forms were printed in Italian. MCC does not dispute the accuracy of the above translation. This translation is set forth in Def.'s Mot. For Summ. J. (DE 27).

> letter within and not later than 10 days after receipt of the merchandise . . . .

MCC does not dispute these underlying facts but argues that the terms on the back of the order form are not part of the parties' agreement because the parties had reached an oral agreement in October of 1990, that the purpose of the order forms was simply to record the price and quantity terms of that agreement, and that the parties did not intend the terms on the back of the form to be binding. (Pl.'s Mem. Of Law in Opp. To Def.'s Mot. For Summ. J. at 3 (DE 52)); (Monzon Aff. ¶¶ 4, 5 (DE 47)).

DISCUSSION

1. Legal Standard for Summary Judgment

Summary Judgment is mandated pursuant to Rule 56(c) of the Federal Rules of Civil Procedure if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). At the summary judgment stage, the trial court's function is "not to weigh the evidence and determine the truth of the matter but to determine whether there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." *Dees v. City of Miami,* 747 F. Supp. 679 (S.D. Fla. 1990) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)).

The movant has the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) . Once the moving party's burden is met, "the adverse party 'must set forth specific facts

showing there is a genuine issue for trial.'" *Anderson*, 477 U.S. at 250 (quoting Fed. R. Civ. P. 56 (e)).

2. Applicable Law

In analyzing the content of the contract between the two parties, this Court will apply the United Nations Convention for the International Sale of Goods (the "U.N. Convention"), *codified at* 15 U.S.C.A. Appendix (West Supp. 1993). This Convention governs contracts for the sale of goods between parties whose places of business are in different nations, as long as both nations are signatories to the U.N. Convention. U.N. Convention Art. 1 § 1; *see also Flianto S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992). Here, the parties have places of business in different nations (Italy and the United States), and both nations are signatories to the U.N. Convention. Accordingly, the U.N. Convention governs the contract for the sale of goods between MCC and Ceramica Nuova.

To support its position that the terms on the back of the order forms are not binding, MCC cites to Article 8 of the U.N. Convention which states, in part:

> [S]tatements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

U.N. Convention Art. 8 § 1. MCC argues that in order to Ceramica Nuova to prevail under the U.N. Convention, it "must conclusively establish that there exists no genuine issue of fact that MCC subjectively intended to be bound by the language which appears on the reverse side of the order form. . . ." (Pl.'s Mem. of Law in Opp. To Def.'s Mot. for Summ. J. at 2 (DE

52)). This court disagrees.

Even if this Court were to accept as true that the MCC had no subjective intent to be bound by the reverse side of the order forms and that Ceramica Nuova knew of that intent, that fact would not, in itself, be sufficient to render those terms nonbinding. Article 8 of the U.N. Convention governs how statements, or contracts, are to be "interpreted." *See* John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* at 106 (2d ed. 1991) (hereinafter *Uniform Law for International Sales.)* Statements, or terms of a contract, are to be interpreted in light of a party's intent where "the other party knew or could not have been unaware" of that intent. U.N. Convention Art. 8 § 1. Here, this Court is concerned with the interpretation of the order forms which state that the "buyer . . . . is aware of the sales conditions stated on the reverse and that he expressly approves of them." The parties do not dispute the meaning of this statement. There is simply no "interpretation"[2] of this clause that would lead to conclusion that the terms on the reverse are in fact *not* approved of and therefore nonbinding. MCC offers no such reading of the clause. Such a reading would not have the effect of "interpreting" the clause, rather it would have the effect of wholly excluding it. Because there is no dispute as to the meaning of the language of the contract, Article 8 is inapplicable. *See generally Uniform Law for International Sales* at 162-172 (discussing the application of Article 8 where terms are ambiguous or the parties offer different

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2. The word "interpret" generally means "to clarify the meaning of." *American Heritage Dictionary of the English Language* (William Morris ed., 1969). This Court finds the language incorporating the terms on the back of the forms to be explicit and not in need of clarification.

understandings of terms).

Article 8 cannot be read to give binding effect to a contracting party's intentions when they contradict the explicit and unambiguous terms of a signed contract. To do so would render terms of written contracts virtually meaningless and severely diminish the reliability of commercial contracts. Accordingly, the terms on the reverse of the order forms are binding, and Ceramica Nuova had the option not to fill orders if MCC was delinquent in payments. Therefore, summary judgment should be entered in favor of Ceramica Nuova on Counts I and III of the Second Amended Complaint (DE 64)

With regard to the counterclaim, this Court finds that the terms on the reverse of the order form are binding and MCC was obligated to make complaints regarding the quality of goods in writing within 10 days of receipt of goods. It is uncontroverted that MCC submitted no written complaints, therefore it cannot rely upon alleged defects in the goods to reduce the amount due. MCC submits the affidavit of Gianfranco Copelli in opposition to the motion for summary judgment on the counterclaim. His affidavit states, in part:

> That Mr. Monzon [of MCC] made complaints concerning the quality of the [Ceramica Nuova] d'Agostino tile in February, March and April of 1991. I relayed those complaints to Sr. Silingardi, who met with Mr. Monzon at the Miami trade fair in May 1991 to discuss the quality of the problem. There was no requirement in the agreement between d'Agostino and [MCC] Super Tiles that complaints be made within a set period of time.

(Copelli Aff. ¶ 13 (DE 51)). This affidavit fails to raise a genuine issue of material fact regarding the obligation of

Ceramica Nuova to submit complaints in writing within 10 days. It fails to state whether the complaints made in February, March and April were timely or what MCC's reaction to those complaints was, other than that they were "discussed." Finally, the last sentence is a legal conclusion that bears no weight on the determination of the motion for summary judgment. Accordingly, summary judgment is also appropriate with respect to Ceramica Nuova's counterclaim.[3]

RECOMMENDATION

After careful consideration and for the foregoing reasons, the undersigned hereby

RECOMMENDS that Ceramica Nuova's Motion for Summary Judgment (DE 27) be GRANTED both as to the complaint and the counterclaim.

The parties have ten (10) days from the date of this Report and Recommendation to file written objections, if any, with the Honorable James W. Kehoe, Senior United States District Judge. *See* 28 U.S.C. §636 (1991). Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir.), *cert. denied*, 488 U.S. 958 (1988).

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3. This Recommendation relates only to the amounts shown in Cermica Nuova's Motion for Summary Judgment to be due, that is 102, 053, 846 Italian Lira or $108, 389.40, plus interest, (DE 27).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 14th day of February, 1994.

S/_____
BARRY L. GARBER
UNITED STATE MAGISTRATE JUDGE

Copies furnished to:
Sr. U.S. District Judge James W. Kehoe
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-2108-CIV-KEHOE
MAGISTRATE JUDGE GARBER

MCC-MARBLE CERAMIC CENTER, INC.
d/b/a SUPER TILES & MARBLE,
Plaintiff/Counter-Defendant,

vs.

CERAMICA NUOVA D'AGOSTINO, S.p.A.,
Defendant/Counter-Plaintiff.
_____/

ORDER

THIS CAUSE is before the Court upon Defendant's Notice of Objection Regarding Scrivener's Error in February 14, 1994 Report and Recommendation. Upon review of the affidavits and invoices submitted in this cause, it is hereby

ORDERED that footnote 3 on page 7 of this Court's February 14, 1994 Report and Recommendation be amended to read as follows:

> This recommendation relates only to the amounts shown in Ceramica Nuova's Motion for Summary Judgment to be due, that is 102,053,846 Italian Lira and $108,389.40, plus interest.

DONE AND ORDERED in Chambers at Miami, Florida this 25th day of February, 1994.

S/ Barry L. Garber
BARRY L. GARBER
UNITED STATES
MAGISTRATE JUDGE

Copies supplied to:
Sr. U.S. District Judge James W. Kehoe
Counsel of record

APPENDIX F
PERTINENT STATUTORY PROVISIONS

PERTINENT PORTIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (15 U.S.C. APPENDIX, PP. 332 *ET SEQ.*)

Article 7 of the CISG provides:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in the application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8 of the CISG provides:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and conduct of a party are to be interpreted according to the understanding a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a

reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practice which the parties have established between themselves, usages and any subsequent conduct of the parties.

CISG Article 39 states in pertinent part:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

CISG Article 50 provides:

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failiure to perform his obligations in accordance with article 37 or article 48 or the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

FEDERAL RULE OF CIVIL PROCEDURE 56(e) Fed. R. Civ. P. 56(e) provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court

may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

APPENDIX G
AFFIDAVITS OF JUAN CARLOS MONZON, GIANFRANCO COPELLI AND GIANNI SILINGARDI

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-2108-CIV-KEHOE

MCC-MARBLE CERAMIC CENTER, INC.,
d/b/a SUPER TILES & MARBLE,

Plaintiff,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P. A.,

Defendant.

AFFIDAVIT OF JUAN CARLOS MONZON

I, JUAN CARLOS MONZON, depose and say:

1. That I am over eighteen (18) years of age, and have personal knowledge of the matters set forth below.

2. That I am, and have been at all times relevant to this lawsuit, the President of MCC-Marble Ceramic Center, Inc.

3. That I was introduced to Gianni Silingardi, who was the commercial director of d'Agostino, by Gianfranco Copelli, one of their commissioned agents, at a trade fair in Bologna, Italy in October of 1990.

4. That Sr. Copelli acted as an interpreter between me and Sr. Silingardi at the Bologna trade fair in Ocober, 1990, since I then spoke only Spanish and English, while Sr.

Silingardi spoke only Italian.

5. That an oral agreement was reached at that time between d'Agostino and Super Tiles for the purchase and sale of one shipment of ceramic tile.

6. That the agreement was based upon the samples of first quality tile which were displayed at the trade fair, and that first commercial choice tile was ordered.

7. That the parties' oral agreement established the essential terms of price, quality, quantity, delivery, and payment.

8. That the price and quantity terms were recorded on a d'Agostino order form, which form was not intended to modify or supersede the parties' oral agreement.

9. That I did not inquire into the terms written on the reverse side of that order form, which, in any event, I would have been unable to read, since the sole purpose of the written form was to record the oral agreement.

10. That I had no intention to assent to the terms written on the reverse of the form, nor was there a translation of them by Sr. Copelli, nor any discussion of them with Sr. Silingardi.

S/
JUAN CARLOS MONZON

The foregoing affidavit was acknowledged before me this 2nd day of July, 1993 by JUAN CARLOS MONZON, who is personally known to me, and who executed the foregoing instrument and who did/did not take an oath.

S/
(Signature of Notary Public)

(Official Seal) _____

(Type or Printed Name of Notary Public, State of Florida
Commission No._____
My Commission Expires:

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-2108-CIV-KEHOE

MCC-MARBLE CERAMIC CENTER, INC.,
d/b/a SUPER TILES & MARBLE,
Plaintiff,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P. A.,
Defendant.

State of Florida)
) SS
County of Dade)

AFFIDAVIT OF GIANFRANCO COPELLI

I, GIANFRANCO COPELLI, depose and say:

1. That I am over eighteen (18) years of age, and have personal knowledge of the matters set forth below.

2. That I was an agent of CERAMICA NUOVA d'AGOSTINO, S. p. A. ('d'Agostino") from the Summer of 1990 through mid-1991.

3. That I introduced Juan Carlos Monzon, the president of MCC-Marble Ceramic Center, Inc., d/b/a/ Super Tiles & Marble (Super Tiles"), to Gianni Silingardi, who was the commercial director of d'Agostino, at a trade fair in Bologna, Italy in October of 1990.

4. That I acted as an interpreter between Mr. Monzon

and Sr. Silingardi at the Bologna trade fair in October, 1990, since Mr. Monzon spoke only Spanish and English, while Sr. Silingardi spoke only Italian.

5. That an oral agreement was reached at that time between d'Agostino and Super Tiles for the purchase and sale of one shipment of ceramic tile.

6. That the agreement was concluded based upon the samples of tile which were displayed at the trade fair.

7. That the parties' oral agreement established the essential terms of price, quality, quantity, delivery, and payment.

8. That the price and quantity terms were recorded on a d'Agostino order form, which form was not intended to modify or supersede the parties' oral agreement.

9. That I did not translate for Mr. Monzon the terms of that order form, since the purpose of the written form was to record the oral agreement.

10. That neither Mr. Monzon nor Sr. Silingardi expressed any intention to include the terms written on the reverse of the form, nor was there any discussion of them.

11. That in February, 1991, I brought a proposal from the d'Agostino factory to Mr. Monzon at his company's offices in Miami Florida. The proposal was that d'Agostino would supply the requirements of Super Tiles during 1991, and that a 3% rebate would be paid by d'Agostino to Super Tiles if its total paid purchases exceeded 200 containers of tile in that year. Confirmation of this agreement was sent by fax from d'Agostino to Super Tiles.

12. That there was no intention on the part of either d'Agostino or Super Tiles for the terms printed on the reverse side of the d'Agostino order form to be incorporated in the requirements contract which governed their relationship for the remainder of 1991.

13. That Mr. Monzon made complaints concerning the

quality of the D'Agostino tile in February, March and April of 1991. I relayed these complaints to Sr. Silingardi, who met with Mr. Monzon at the Miami trade fair in May, 1991 to discussthe quality problem. That there was no requirement in the agreement between D'Agostino and Super Tiles that complaints be made within a set period of time.

13. That in March, 1991, Sr. Vincenzo Maselli, a local political official of the governing Christian Democratic Party, was appointed as Director of d'Agostino, for the purpose of winding down and closing the factor. Many contracts with d'Agostino customers were unilaterally modified by Sr. Maselli to require payment by letter of credit; supplies of title were cut, or tile of inferior quality was provided, to those customers who refused the new payment terms.

S/
GIANFRANCO COPELLI

The foregoing affidavit was acknowledged before me this 29th day of July, 1993 by Gianfranco Copelli, who is personally known to me, and who executed the foregoing instrument, and who did take an oath.

S/
(Signature of Notary Public)

(Official Seal)

S/
(Typed or Printed Name of Notary Public) Notary Public, State of Florida
Commission No. cc-272616
My Commission expires:March 30, 1997

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-2108-CIV-KEHOE

MCC-MARBLE CERAMIC CENTER, INC.,
d/b/a SUPER TILES & MARBLE,

Plaintiff,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P. A.,

Defendant.

State of Modena)
) SS
County of Italy)

AFFIDAVIT OF GIANNI SILINGARDI

I, GIANNI SILINGARDI, depose and say:

1. That I am over eighteen (18) years of age, and have personal knowledge of the matters set forth below.

2. That I was the Commercial Director of CERAMICA NUOVA D'AGOSTINO, S.p.A. ("d'Agostino") during all of 1990 and the first half of 1991.

3. That I was introduced to Juan Carlos Monzon, the president of MCC-Marble Ceramic Center, Inc., d/b/a Super Tiles & Marble ("Super Tiles"), by Gianfrance Copelli, a commissioned agent of d'Agostino, at a trade fair in Bologna, Italy in October of 1990.

4. That Sr. Copelli acted as an interpreter between Mr. Monzon and me at the Bologna trade fair in October, 1990, since Mr. Monzon spoke only Spanish and English, while I spoke only Italian.

5. That an oral agreement was reached at that time between d'Agostino and Super Tiles for the purchase and sale of one shipment of ceramic tile.

6. That the agreement was based upon the samples of first quality tile which were displayed at the trade fair, and that first commercial choice tile was ordered.

7. That the parties' oral agreement established the essential terms of price, quality, quantity, delivery, and payment.

8. That the price and quantity terms were recorded on a d'Agostino order form, which form was not intended to modify or supersede the parties' oral agreement.

10. That neither Mr. Monzon nor I had any intention to include the terms written on the reverse of the form, nor was there any discussion of them.

S/
GIANNI SILINGARDI

VERIFICATION

I verify, under penalty of perjury under the laws of the United States of America, that I have read the above affidavit, which is true and correct.

Executed on this 10th day of June, 1993

S/
Signature

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-2108-CIV-KEHOE

MCC-MARBLE CERAMIC CENTER, INC.,
d/b/a SUPER TILES & MARBLE,
Plaintiff,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P. A.,
Defendant.

State of Florida)
) SS
County of Dade)

AFFIDAVIT OF GIANNI SILINGARDI

I, GIANNI SILINGARDI, depose and say that:

A. Background.

1. I am over eighteen (18) years of age, *sui juris*, and have personal knowledge of the matters set forth below.

2. I began working in the business of ceramic tile production in 1964, mostly in management. Specifically, I worked for Ceramica Ducale for approximately ten years; for Grupo San Marco for approximately ten years; for Grupo Spea for approximately five years. I was the Commercial Director of CERAMICA NUOVA d'AGOSTINO, S. p. A. ("dAgostino") for approximately two years including late 1989,

all of 1990 and the first half of 1991. Currently, I am the President of T&T Diffusion, S. R. L.

3. The original Ceramica d'Agostino company was in business during most of this century. In 1988 or 1989, the company received funding from G.A.P.I., a branch of the Italian government, to modernize its production facilities and increase its capacity, which facilities became operational in 1990 as "Ceramica Nuova d'Agostino."

B. Initial Agreement with Super Tiles.

4. In October of 1990, I was introduced to Juan Carlos Monzon, the president of MCC-Marble Ceramic Center, Inc., d/b/a Super Tile & marble ("Super Tiles"), by Sig. Gianfranco Copelli, a commissioned agent of d'Agostino doing business as Mirea, S.D.F. ("Mirea"), at a trade fair in Bologna, Italy.

5. As a general agent of d'Agostino, Sig. Copelli had the power to bind d'Agostino to orders that he negotiated, subject to refusal in writing by d'Agostino.

6. Sig. Copelli acted as an interpreter between Mr. Monzon and me at the Bologna trade fair in October, 1990, since Mr. Mnzon spoke no italian, while I spoke little English.

7. An oral agreement was reached at the Bologna trade fair between d'Agostino and Super Tiles for the purchase and sale of one shipment of eight containers of ceramic tile.

8. Our agreement was based upon the samples of first quality tile, known as "First Commercial Choice," (written as "1°C" or "1 °Comm") which were displayed at the trade fair, and that 1 °C file was ordered. At that time, d'Agostino sold only two grades of tile, the higher being 1°C, and the lower being "Mezza Scelta" (written as "MS").

9. Our oral agreement established the essential terms of quality, quantity, description of goods, delivery, price and payment.

10. The contract terms were recorded on a d'Agostino "Proposta di Commissione" purchase order form, which form was not intended to modify or supersede the parties' oral agreement. A *Prosposta* was not necessary, as I had the power to accept the order as Commercial Director.

11. I did not ask Sig. Copelli to translate for Mr. Monzon the terms of that order form, since the purpose of the written form was to memorialize the quantity, quality, description, price and payment terms of the oral agreement, for convenience.

12. Mr. Monzon did not express, nor did I have, any intent to include in our agreement the terms written on the reverse of the form, nor was there any discussion of those terms. Under Italian trade practice, the terms on the reverse of a *Proposta* form are not applicable unless specifically included by hand-written reference on the face of the form. These terms could not be enforced against a buyer in Italy, nor did d'Agostino ever attempt to do so during my tenure as Commercial Director.

C. Trade Terms

13. The payment terms given to Super Tiles varied from 60 to 150 days. Customarily, such terms are not enforced strictly, but include an additional acceptable delay of 30-60 days beyond the stated payment date. Sig. Maselli sought to coerce d'Agostino's customers to pay by letter of credit, and allocated the shipments of tile from the factory to those customers that agreed to pay in that manner. Customers who refused to pay by letter of credit received inferior merchandise in irregular shipments.

D. Customer Complaints, Quality and Production Problems

15. Super Tiles brought complaints to my attention in January and/or February, 1991, regarding the quality of the tile shipped, as did a number of other customers during early 1991.

Due to internal frictions within d'Agostino between the marketing and production departments, these complaints were ordinarily handled by providing a discount in price on subsequent shipments to the complaining customers.

16. I, as Commercial Director, under the direction of Sig. Vincenzo Maselli, modified certain orders by Super Tiles, placed through Mirea in February and April, 1991, when they were received at d'Agostino, because the prices offered to Super Tiles by Mirea were too low. Without notice to Super Tiles, the management of d'Agostino substituted approximately 30% of the 1°C tile ordered with MS tile. The *Proposta* dated April 27, 1991 (numbered D10096) attached hereto has notations in my hand-writing that modified the quality of tile to be delivered..

E. Requirements Contract with Super Tiles.

17. In March, 1991, Sig. Copelli and I spoke with Mr. Monzon and negotiated a requirements contract with Super Tiles. That agreement provided that d'Agostino would supply Super Tiles' requirements during 1991 of 1°C quality tile, at the prices negotiated for previous orders with an additional 3% discount if Super Tiles purchased 200 containers of tile. That quantity would have represented roughly 1/7 of the annual production of d'Agostino operating under normal conditions. This agreement was confirmed in writing.

18. Although Super Tiles was performing its obligations under the Requirements Contract, d'Agostino shipped MS-grade tile to Super Tiles in substitution of 1°C-grade tile, and failed to ship the quantities of tile order by Super Tiles. These actions of d'Agostino were motivated by continuing production and quality-control problems in the factory. At that time, most of the production was second quality or third quality tile, primarily with defects in the size, shape and topography of the tile. Defects in the shape or

topography of a tile are not readily apparent upon inspection, and are ordinarily not discovered until installation.

19. Production of tile at the d'Agostino factory was halted in late 1991 due to high operating costs and chronic quality-control problems.

F. Change in Control of d'Agostino.

20. A change in the management of the d'Agostino factory occurred in early 1991 due to a change in government from the Socialist Party to the Christian Democratic Party. Sig. Maselli, a Christian Democratic Party member, was appointed at that time to manage d'Agostino. All of the other managers, including me, were replaced over the following six months.

S/
GIANNI SILINGARDI

The foregoing affidavit was acknowledged before me this 10th day of August, 1995 by GIANNI SILINGARDI, who is personally known to me, or who has produced and exhibited to me_____, as evidence that he is the person who is described in, and who executed, the foregoing instrument and who did/did not take an oath.

S/
(Signature of Notary Public)

(Official Seal)

S/
(Typed or Printed Name of Notary
Public Notary Public, State of Florida
Commission No. cc-272616
My Commission expires:
March 30, 1997

APPENDIX H
ENGLISH TRANSLATION OF
CONTRACTUAL TERMS

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-2108-CIV-KEHOE

MCC-MARBLE CERAMIC CENTER, INC.,
d/b/a SUPER TILES & MARBLE,
Plaintiff,

-against-

CERAMICA NUOVA D'AGOSTINO, S. P. A.,
Defendant.

State of New York)
) SS
County of New York)

Maarten Jacobus Drop, hereby duly sworn, deposes and says:

1) I am a citizen of the Netherlands and graduate of the Amsterdam University Law School, where I received a Doctor of Laws degree.

2) I am fluent in English and Italian languages.

3) I lived in Verona, Italy, for one and a half year, where I was a law intern in a major law firm.

4) I am a attorney with a major Amsterdam based law firm which works closely together with Italian corresponding

offices.

5) The Court will note that the annexed exhibits 1 and 2 have been translated into English, as exhibits 3 and 4. I hereby certify that the English translation is a true and accurate translation of the Italian text.

S/
Maarten Jacobus Drop

Sworn before me this
27th Day of April, 1993

S/
Notary Public

ORDER PROPOSAL No. 0680 | Date 04/08/1999

Customer

SUPER TILES MARBLE | Tel. .....

Street 79th Avenue | Zip Code ..... | City MIAMI | Province Florida

Destination of Merchandise 707484

Location .....

Street .....

City ..... Province .....

Territory Code Mirna 10

Customer ID No. .....

Tax ID No. .....

VAT ID No. .....

Payment Code .....

Payment .....

Bank Reference .....

Transport: Provided by Customer / Provided by Buyer | Returns ..... | Terms of Delivery .....

Measurement	Description of Merchandise	Code of Material	Commercial Grade	Packaging Units	q.ty Quantity	Price	Amount
40 x 40	Marble Grey		1st. comm.	2 cart.			
40 x 40	Marble Beige		1st. comm.	2 cart.			
40 x 40	Marble Rose		1st. comm.	1 cart.			
30 x 30	Marble Grey		1st. comm.	2 cart.			
30 x 30	Marble Beige		1st. comm.	1 cart.			
30 x 30	Marble Rose		1st. comm.	1 cart.			
30 x 30	Marble Mint		1st. comm.	1 cart.			
30 x 30	Grey		1st. comm.	1 cart.			
30 x 30	Rose		1st. comm.	1 cart.			
30 x 30	Mint		1st. comm.	1 cart.			
30 x 30	Beige		1st. comm.	1 cart.			

Notes

Total 14 containers Ship 7 containers immediately

AGENT

EXHIBIT 3

For the purposes of Article 1341(2) of the [Italian] Civil Code the buyer acknowledges having read and explicitly consents to the terms and conditions of sale printed on the back of this form, especially with regard to the clauses 1-2-3-4-5-6-7-8.

SIGNATURE .....

BEST AVAILABLE COPY

GENERAL CONDITIONS OF SALE

1. *Orders and Confirmations of Orders*. The supply only includes the goods and quantities specified in our order confirmation or in other written communications from Ceramica Nuova d'Agostino ("d'AS"). The orders given to agents, representatives, traveling sales representatives, employees acting on behalf of d'AS are binding for the buyer and they are only binding for d'AS if the merchandise is in d'Agostino's warehouse. The orders become binding and final for d'AS only when the latter has directly given a specific written confirmation to the buyer. The partial execution of the order by no means binds d'AS to accept and execute the entire order.

2. *Transport and Delivery*. The merchandise is sold ex factory from our establishment in Salerno and travels on the account of, at the risk and peril of the buyer, even when the price is agreed upon free destination. The d'AS company is not responsible for possible breakage, chipping, wear and tear, losses, misrouting, theft of the merchandise entrusted to the carrier. The recipient shall obtain agreement before delivery on shipping and packaging conditions contrary to the forwarding agent's normal terms of business or shall accept them without reserve. All increases in charges for transportation [made] after the order date shall at all times be charged to the buyer, including merchandise exempt from delivery charges.

The unloading of the merchandise during transportation, will in all cases, be carried out at the risk and cost of the buyer. With regard to the oven fired goods shipped in containers belonging

to d'AS, the buyer shall return these containers within 15 days after the delivery at the buyer's risk and cost; if he fails to do so, d'AS is authorized to issue an invoice for the cost of the containers with payment to be made by the buyer upon presentation of a sight draft.

In any event, the buyer shall in no circumstances refuse merchandise received or decline to collect the same for any reason whatsoever or in cases of controversy, without the express authorization of d'AS. In the event that d'AS authorizes the return of the merchandise, only the costs of transport shall be charged to the company, with the exclusion of any other costs whatsoever. The return of the merchandise shall not determine the cancellation of the contract.

3. *Terms of Delivery*

(a) Except for the insertion of certain clauses, the time of delivery must as a rule be considered purely indicative and not of the essence. The time shall only include working days used for the production of the product. When changes in the contract are introduced, the time of delivery is extended for a period equal to that originally established. The cancellation of orders due to delays in the delivery is not agreed upon without the explicit acceptance of d'AS.

The selling company reserves the rights to cancel orders already being processed as a result of war, political disturbances, forced restriction of production, the breakdown of ovens or machines, difficulties in securing raw materials, strikes, union workers' disputes, agitation or for all types and other causes of force majeure.

(b) In the event of delay in delivery not justified by force majeure as indicated above, in case of damage shown by means of documentation by the buyer, d'AS shall pay for damage claims in an amount equal to 0.20% of the value of the merchandise for each week of delay and, in total, not more than 5% of the value of the material which was not delivered.

D'AS' responsibility for damages is expressly limited to the above amount. In all cases where there is undue delay in delivery, the buyer can withdraw from the contract or request its cancellation if the delay is more than double the time agreed upon for the delivery. In such case, after the restitution without interest of the money paid on account, the buyer has no right to any other indemnification or damages from d'AS.

4. *Technical requirements and characteristics of quality of the merchandise-Complaints.* The technical requirements of the merchandise sold, including physical and chemical, indicated in samples and price lists, must be understood as being indicative. Variations in dimensions, form, appearance and color are tolerated. Such variations do not determine any rights or indemnifications for the buyer and d'AS does not give any warranty in this regard.

D'AS shall provide a warranty for specific qualitative characteristics of the merchandise sold, only under the express request of the buyer at the time the order is placed and is limited to the top grade merchandise. No warranty may be granted from materials of commercial value or second grade or below standard.

Possible complaints for defects of the merchandise must be

made in writing by means of a certified letter within and not later than ten days after receipt of the merchandise and in all events always before work is begun if the merchandise sold was glazed tiles and always before glazing if it is a question of oven fired goods. No complaints of any kind are accepted concerning the delivery of glazed materials already installed or of oven fired goods. No complaints of any kind are question are accepted concerning the delivery of glazed materials already installed or the oven fired goods subsequently glazed by the buyer.

In the event that a timely complaint is made and is well grounded, the obligation of the seller is limited to the replacement of the goods recognized as defective, if possible, or with other goods of equal value; the delivery shall be made at the same location as the first delivery, and the buyer will have no right to cancellation of the contract or to damages. The replacing of the goods shall not take place if the buyer does not immediately stop working on the oven fired material if he uses the materials complained of. In any event, possible reductions, transactions, replacements, etc. made by agents or even employees of d'AS, are only effective if approved by the d'AS Sales Management, which, if agreed upon, shall give explicit written confirmation thereof. D'AS assumes no responsibility for the suitability of the material for the use which the buyer has intended it and this is also true in the event that suggestions or indications concerning the installation and employment of the same were made by the seller.

5. *Price changes.* After being notified by the buyer the seller has the right to change the prices of the goods in the event that, between the time of receipt of the order and delivery of the goods, increases of more than ten percent have taken place with regard to manpower and/or raw materials, or, in the costs of

production. In any case, inspections of the corporate records of d'AS are forbidden.

6. *Payment.*

(a) If claims are not received by the seller within fifteen days from the shipment of the merchandise, the delivery is considered to have been received and accepted in its entirety. The payment of the invoices must be carried out in Italian lira. The payment shall be made at the headquarters of d'AS.

The issuance of drafts, if payable in other locations do not derogate to the above specified clause. The possible acceptance of promissory notes, endorsed bills and bank checks are at all times understood to be agreed upon as "subject to collection" and without novation of the debt.

(b) Delay in payment, including partial payment, of the invoices issued by d'AS determines the running of interest in the measure that Banking Institutions apply for black interest rates.

In any event, default or delay in payment, within the time agreed upon gives d'AS the right to demand the anticipated payment of the remaining invoices, and otherwise to suspend or cancel the contract itself, and to cancel possible other pending contracts and the buyer does not have the right to any indemnification or damages. In the event of payments in installments or of sales in more than one delivery, default in payment of one installment causes the immediate and anticipated repudiation of the subsequent installments

by the seller.

(c) In case of protest of promissory notes or drafts of the buyer after the execution of the order, or if it becomes public knowledge that protests have occurred in previous years, d'AS has the right to unilaterally withdraw from the contract if the contract is still executory. In any event, this shall determine the immediate cancellation of the contract. In such event, d'AS reserves the right to seek warranties to its satisfaction for all merchandise already shipped but not paid for and reserves the right to request immediate payment for the delivered merchandise even if the agreed time for payment had not yet expired.

7. *Reservation of Ownership.*

The sale of the goods according to this order is made under reservation of ownership in favor of d'AS, until full payment of the goods has been received by the seller.

8. *Jurisdiction.*

The courts of Salerno have sole jurisdiction to decide all controversies in which d'AS is a party to.